IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 725.

WILSON W. RICHARDSON,
Petitioner,

vs.

THE JAMES GIBBONS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF RESPONDENT.

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STATEMENT OF THE CASE.

This is an action instituted by Wilson W. Richardson, a former employee, against his employer, The James Gibbons Company, for alleged overtime compensation, liquidated damages and attorney's fee under the Fair Labor Standards Act of 1938. The question of minimum wages is not involved as petitioner concedes his wages were above the minimum. The Maryland District Court, as well as the Circuit Court of Appeals for the Fourth Circuit, held that the employee was exempted as his hours of service were controlled by the Interstate Commerce Commission.

The opinion of the Circuit Court of Appeals (R. 2-9) is reported in 132 Fed. 2d 627. The opinion of the District Court is not reported.

The facts are set forth in the stipulation (R. 1-2) and also in the Circuit Court's opinion (R. 2-3).

Briefly, the Petitioner, Wilson W. Richardson, was employed by the Respondent as a truck driver and distributor-operator from October 24, 1938 to September 4, 1940. His duties consisted of transporting and distributing asphalt which was used in the building and repairing of roads, driveways, airplane runways, etc. There was a conflict in the testimony as to the amount of time Petitioner was engaged as a truck driver and as a distributor-operator. Petitioner's testimony was to the effect that during the period in question he was employed approximately twenty-five per cent. of the time as a truck driver and seventy-five per cent. of the time as a distributor-operator. Respondent's testimony was that Petitioner was employed approximately seventy-four per cent. of his time as a truck driver and twenty-six per cent. of his time in distributing the asphalt.

Some of the facts set forth by Petitioner in his brief are not entirely correct and not included within the stipulation of facts agreed to by the parties. For example, petitioner says in his brief (page 3) that he was on duty "from a minimum of approximately forty hours a week during slack periods to a usual maximum during busy periods of approximately eighty-five hours per week." Such testimony does not appear in the stipulation of facts and is denied by Respondent.

SUMMARY.

Petitioner's sole argument in the District Court was addressed to the proposition that his truck driving was merely incidental to his main employment as distributor-operator and tha' as the latter duty did not affect safety of operation, he was not covered by the Act. The Circuit Court had little trouble in disposing of this contention (R. 4) and Petitioner makes little mention of same in his brief (page 8).

The important question is to determine whether the overtime provision of the Fair Labor Standards Act applied after the Interstate Commerce Commission had been given the power to regulate this class of employees.

The pertinent parts of the two statutes in question are Section 13 (b) of the Fair Labor Standards Act of 1938, which provides:

> "The provisions of Section 207 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49 . . ."

and Section 304 (a) (3) of Title 49 (Motor Carrier Act of 1935), which provides:

> "(a) It shall be the duty of the Commission . . .
>
> "(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees and standards of equipment . . ."

Under these interrelated statutes Respondent contends:

(1) The activities as a truck driver and distributor-operator of asphalt distributing trucks affects safety of operation as announced by this Honorable Court in the

case of U. S. v. American Trucking Association, Inc., 310 U. S. 534.

(2) Petitioner was not subject to the overtime provisions of the Fair Labor Standards Act because:

(a) The language of the exemption statute is plain and unambiguous and the purpose and intent of the Act does not warrant a strained construction.

(b) It was not the intention of Congress to postpone jurisdiction over drivers of private carriers until regulations had been adopted by the Interstate Commerce Commission.

ARGUMENT.

1.

THE ACTIVITIES OF A TRUCK DRIVER AND A DISTRIBUTOR-OPERATOR AFFECTS SAFETY OF OPERATION.

Petitioner in his brief (page 8) contends that the driving of the trucks was merely incidental to his duties as a distributor-operator. The facts do not bear out this contention. Petitioner admits that he was employed approximately twenty-five per cent. of his time as a truck driver (R. 1). The more exact information furnished by the employer showed that the plaintiff was engaged approximately seventy-four per cent. of his time as a driver and the remaining twenty-six per cent. as a distributor. His duties as a driver or chauffeur, therefore, cannot be said to be incidental.

The Circuit Court had no difficulty with the point and said, 132 Fed. 2d p. 638: (R. 4)

> "Nor are we impressed by Richardson's contention that whatever driving of the truck, or trucks (upon which the Distributor Tank and Mechanism were mounted) that he did was but incidental to his main employment of 'Distributor-Operator' and that, there-

fore, he is within the provisions of the Fair Labor Standards Act, because 'the Interstate Commerce Commission has not the power to establish for him, the plaintiff, qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935.' See Rozmus v. Jesse T. Davis & Sons Co., 23 N. Y. S. 2d 821 (truck driver and delivery man, who also performed services about the yard where employer's business was conducted); Gavril v. Kraft Cheese Co., D. C., 42 F. Supp. 702 (driver-salesman) of cheese and food products . . . And the fact that the contents of the truck or trucks driven by Richardson, were liquid asphalt products, which, counsel for Richardson admits in his brief, are 'flammable and explosive', we think, brings his case even more clearly within the decision of the American Trucking Association's case, supra."

Necessarily these tank trucks were driven over the highways in delivering the asphalt. Even while distributing the asphalt in repairing and resurfacing the roads (as contrasted with new construction), it was necessary to operate the trucks over the highways. Add to this the fact that the commodity transported in the truck was flammable and explosive and there can be little question that Petitioner's activities affected safety of operation as laid down by Mr. Justice Reed for this Court in the case of *U. S. v. American Trucking Association, Inc.*, supra.

2.

PETITIONER WAS NOT SUBJECT TO THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT BECAUSE THE LANGUAGE OF THE EXEMPTION SECTION IS PLAIN AND UNAMBIGUOUS AND THE PURPOSE AND INTENT OF THE ACT DOES NOT WARRANT A STRAINED CONSTRUCTION.

In considering this question, we must start with the following propositions: (a) That the petitioner had the burden of showing error in the judgment which he asks

this Court to set aside;[1] (b) that practically all available authority, including two Circuit Courts of Appeals, have decided the question against the Petitioner;[2] (c) that the plain language of the statute and the intent of Congress clearly support Respondent's contention; (d) that a decision by the Court at this late date placing drivers of private carriers under Fair Labor Standards Act would not affect safety as said drivers have been definitely excluded since May 1, 1940.

Section 13 (b) of the Act provides that overtime compensation shall not apply to any employee with respect to whom the Interstate Commerce Commission *has power* to establish qualifications and maximum hours of service pursuant to the provisions of the Motor Carrier Act. This Act was passed after the Motor Carrier Act and the debates and discussion show that Congress was entirely acquainted with the prior Act.[3]

In the interpretation of statutes, it is, of course, the function of the courts to construe the language so as to give effect to the intent of Congress[4] and it is elementary that the intention of the Legislature or the meaning of the statute must in the first instance be sought from the lan-

[1] Higgins v. Carr Bros. Co., 87 L. Ed. 398, decided January 18, 1943.

[2] Richardson v. The James Gibbons Co., 132 Fed. 2d 627, C. C. A. 4th; Plunkett v. Abraham Bros. Packing Co., 129 Fed. 2d 419, C. C. A. 6th; Faulkner v. Little Rock Mfg. Co., 32 Fed. Supp. 590 (E. D. Ark.); Bechtel v. Stillwater Mining Co., 33 Fed. Supp. 1010 (E. D. Okla.); West v. Smoky Mountain Stages, 40 Fed. Supp. 286 (N. D. Ga.); Gavril v. Kraft Cheese Co., 42 Fed. Supp. 702; Robins v. Zabarsky, 44 Fed. Supp. 867 (D. C. Mass.); Magann v. Long's Baggage Transfer Co., 39 Fed. Supp. 742; McDaniel v. Clavin, (Cal. D. Ct. of Appeals) 128 Pac. 2d 821; Dallum, et al., v. Farmers Cooperative Trucking Association (D. C. Minn.), 46 Fed. Supp. 785; Gerdert, et al., v. Certified Poultry and Egg Co. (D. C. So. D. Fla.), 38 Fed. Supp. 964; Fitzgerald, et al., v. Kroger Grocery and Baking Co. (D. C. Kan.), 45 Fed. Supp. 812; Corbett v. Schlumberger Well Surveying Corp. (D. C. S. D. Tex.), 43 Fed. Supp. 605; Gibson v. Wilson & Co., 4 Labor Cases 60466 (D. C. W. D. Tenn.); Anuchick, et al., v. Trans. Freight Lines, Inc., 46 F. Supp. 861 (D. C. E. D. Mich.). Contra, Bayley, et al., v. Southland Gasoline Co., 131 Fed. 2d 412 (C. C. A. 8th).

[3] 81 Congressional Record 7875, etc.

[4] U. S. v. American Trucking Association, Inc., supra, p. 542.

guage used in the statute. If that language is plain and does not lead to absurd or impractical results, the sole function of the courts is to enforce it according to its terms.[5]

If Congress had not intended the exemption to apply until the Interstate Commerce Commission not only found a need for the regulation of private carriers but actually passed a final order,[6] the words "power to" are superfluous. In other words, the statute should have read: "The provisions of Section 207 shall not apply to any employee with respect to whom the Interstate Commerce Commission has established qualifications and maximum hours, etc."

Statutory words are presumed, unless the contrary appears, to be used in their ordinary or usual sense. The ordinary meaning of the word "power", namely, "the right, ability or facility of doing something,"[7] supports the interpretation placed upon the statute not only by the Respond-

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[5] Caminetti v. U. S., 242 U. S. 470; 61 L. Ed. 442; Sutherland on Statutory Construction, 2d Ed., Sec. 366, p. 698; Crawford on Statutory Construction (1940 Ed.), p. 244, Sec. 158, p. 315, Sec. 185, and cases cited under note No. 18, U. S. v. American Trucking Ass'n., Inc., supra, p. 543.

[6] The Interstate Commerce Commission from the beginning realized there was a need for regulating private carriers. In this regards, it should be noted that the Commission on July 30, 1936 instituted an investigation for the purpose of ascertaining the facts respecting the hours of service of employees in motor carrier transportation for the three classes of carriers provided for in Section 204 of the Act. After the investigation was started, the Commission found it impossible at that time to investigate the maximum hours of service of employees of private carriers and said that said investigation would be undertaken as soon as possible. Interstate Commerce Commission Reports, Motor Carrier Cases, Vol. 3, p. 665. Subsequently, on May 9, 1939, the Commission said that it was clear that they had the power to prescribe qualifications and maximum hours for drivers and their helpers employed by private carriers of property. Interstate Commerce Commission Reports, Motor Carrier Cases, Vol. 13, p. 481. On May 1, 1940, the Commission formally held that there was a need for federal regulation of private carriers but that certain safety regulations would not be made applicable to same until Congress appropriated additional funds for that purpose. I. C. C. Reports, Motor Carrier Cases, Vol. 23, p. 1, at p. 35. After a number of postponements, on Sept. 30, 1940, the Commission vacated its order of May 1, 1940 and passed a new order effective Oct. 15, 1940. I. C. C. Reports, Motor Carrier Cases, Vol. 26, p. 205, at p. 208.

[7] Bouvier's Dictionary, 8th Ed., Vol. 2.

ent but by practically all courts which have considered the question.* The Circuit Court of Appeals said in this case (R. p. 6):

> "The real question here is the meaning of the word 'power' in Section 13(b) of the Fair Labor Standards Act. Congress, we think, meant the existence of the power, not its actual exercise. The Fair Labor Standards Act was enacted after the Motor Carrier Act and the later statute, we believe, intended to draw a line of cleavage between those cases on which the Interstate Commerce Commission could take action and those cases on which it could not. The restricted definition of the word 'employee' in United States v. American Trucking Association, 310 U. S. 534, would seem to lend color to this view, and we think we find in that opinion a reflection of the philosophy of the Fair Labor Standards Act and the Motor Carrier Act to which we adhere. . . .
>
> "The Bayley decision gives to coverage under the Fair Labor Standards Act a gap or hiatus in time, a kind of period of suspended animation to this same status of coverage. It makes certain employees subject to this Act and then, a moment later when the Interstate Commerce Commission has made the finding of necessity, the coverage of the Act suddenly ceases. We hesitate to think that Congress deliberately undertook to bring about such a situation, with all the pains, penalties and uncertainties thereunto appertaining . . ."

Likewise, numerous District Courts reach the same conclusion. In the case of Faulkner v. Little Rock Manufacturing Co., the Court said, supra, page 591:

> ". . . It appearing that under the provisions of Section 304 (a) (3), Congress has delegated to the Interstate Commerce Commission the power to make regulations for qualifications and the maximum hours of

* See cases cited under Note 2 of this brief.

service for such employees, the whole field is occupied and it further appearing that under the provisions of the Fair Labor Standards Act of 1938 as amended the regulation of qualifications and maximum hours of service of employees 'with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service' have been exempted from the provisions of the Fair Labor Standards Act of 1938, there is and could be no reservation of power to the administrator of the Fair Labor Standards Act of 1938 to act until such time as the Interstate Commerce Commission shall see fit to act."

In West v. Smoky Mountain Stages, District Judge Underwood stated:

"... the fact that the Interstate Commerce Commission may not have assumed jurisdiction over mechanics prior to this suit is immaterial. The exemption of employees from application of the Fair Labor Standards Act is not made, by Section 13 (b) of the Act, to depend upon the exercise of power over them by the Interstate Commerce Commission but merely upon the existence of 'power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 (304 of Title 49) of the Motor Carriers Act'. The evidence in this case establishes the fact that the Interstate Commerce Commission had this power and that fact excludes jurisdiction of the administrator over the plaintiff's activities and the Fair Labor Standards Act was, therefore, not applicable in the plaintiff's situation and no cause of action is set forth in his petition."

District Judge Ford in the case of Robins v. Zabarsky, District Ct. of Mass., supra, p. 870, succinctly held:

"If the Interstate Commerce Commission has the power to fix maximum hours for a given employee, the Fair Labor Standards Act is not applicable to him regardless of whether or not the Commission has rec-

ognized the power. This is the plain language of Section 13 (b) (1) and the construction by the courts has followed it."

The question was carefully considered by the California District Court of Appeals in McDaniel, et al., v. Clavin, 128 Pac. 2d 821, at 826, where the Court said:

> "Plaintiff denies that Sec. 213 (b) applies because the Interstate Commerce Commission has not taken jurisdiction; that it has neither prescribed nor promulgated regulations and maximum hours for the employees of Plaintiff's class. But Sec. 213 (b) contains no provision that the Commission must have established requirements or prescribed qualifications or maximum hours of service of employees in order to make it applicable. It declares merely that Sec. 207 (a) does not apply in the case of any employer with respect to whom the Interstate Commerce Commission has power to establish maximum hours of service. The provisions of the Fair Labor Standards Act for maximum working hours of employees does not, by virtue of the provisions of Sec. 213 (b) apply to those employees with respect to whom the Interstate Commerce Commission has power to establish maximum hours of service."

Likewise, in the case of Overnight Motor Transportation Co., Inc., v. Missel, 62 Sup. Ct. 1216, 316 U. S. 572, at p. 582, this Court discussed Section 13 (b) and the different orders and bulletins of the Interstate Commerce Commission and inferentially held that the employee would have been exempted if the Interstate Commerce Commission had the power to regulate his hours.[9]

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[9] "Sec. 13 (b) (1) exempts from Section 7 employees from whom the Interstate Commerce Commission has power to establish maximum hours of service . . . These various determinations now make it clear that respondent was subject at all times since the effective date of the Fair Labor Standards Act to its provisions. The Interstate Commerce Commission never had the power to regulate his hours."

A number of other well reasoned opinions have reached the same conclusion.[10] In fact practically all available authority, with the exception of the Bayley decision, construes the statute according to its plain meaning. The forceful and concise briefs filed by the petitioner in the Bayley case furnishes a complete answer to that decision.

3.

IT WAS NOT THE INTENTION OF CONGRESS TO POSTPONE JURISDICTION OVER DRIVERS OF PRIVATE CARRIERS UNTIL REGULATIONS HAD BEEN ADOPTED BY THE INTERSTATE COMMERCE COMMISSION.

A careful consideration of the Fair Labor Standards Act of 1938 shows that it intended to exempt from the overtime provisions all employees whose activities could be regulated by the Interstate Commerce Commission similarly as it exempted many other employees under Section 13 (a), such as executives, outside salesmen, employees of retail and service establishments, seamen, air-carrier employees, fishermen, farmers, apprentices, messengers, employees of small newspapers, street railway employees, etc.

The Fair Labor Standards Act was, therefore, never intended to cover all employees engaged in interstate commerce or in the production of goods for commerce as this Court recently said:

> "The history of the Legislature leaves no doubt that Congress chose not to enter areas which it might have occupied."[11]

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[10] See cases cited under Note 2 of this brief.

[11] Kirschbaum v. Walling, 316 U. S. 517, at page 522, 86 L. Ed. 1639.

The debates in the Senate on the Fair Labor Standards Act show that the law makers knew that the Interstate Commerce Commission was then undertaking to regulate truck drivers and Congress did not desire the hours of service to be subjected to two governmental agencies. Congress properly assumed that the hours of labor of truck drivers would be regulated by the Commission.[12]

As previously stated, if Congress had intended not to exempt these employees until the Interstate Commerce Commission had actually prescribed regulations, it would have done so simply by omitting the words "power to" in Section 13 (b). The uncertainty of waiting for the Interstate Commerce Commission to establish regulations is indicated in the proceedings of the Interstate Commerce Commission set forth in Note 6 of this brief.

Let us now consider Section 204 of the Motor Carrier Act of 1935 which was, of course, passed three years prior

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[12] 81 Congressional Record, p. 7875:

Mr. Black: ". . . The committee were of the opinion when we originally took up the bill for consideration that it was exceedingly important that the long hours of truck drivers should be regulated in the interest of public safety. . . .

"Speaking for myself personally, it is my belief that it would certainly be unwise to have the hours of service regulated by two governmental agencies. I am further of the opinion that the Interstate Commerce Commission, since it has the power and has exercised it, should be the agency to be entrusted with this duty. We were very much disturbed about the matter of hours of labor required of employees of trucking companies and associations, particularly the long hours the drivers are compelled to work. Undoubtedly the Interstate Commerce Commission has adopted a regulation under the law. . . ."

Mr. Shipstead: ". . . Am I to understand the Senator from Alabama to say that the Interstate Commerce Commission is now undertaking to regulate hours and wages of truck drivers?"

Mr. Black: "Not wages but hours of labor."

Further discussion between Senators Black, Moore and Shipstead showed that the Senators realized that the Interstate Commerce Commission law imposed the duty on the Interstate Commerce Commission to regulate hours of truck drivers and that they did not wish to entrust the same responsibility to two governmental agencies.

to the Fair Labor Standards Act. This Section[13] made it the duty of the Commission to regulate common, contract and private carriers and expressly to establish "maximum hours of service of employees" with which we are here concerned. The language of the three sections is somewhat different and great emphasis is placed by petitioner on the words "if need therefor is found" in Section (3). Upon a careful consideration of the three sections and their legislative history, it becomes apparent that there can be no valid distinction between them. The Interstate Commerce Commission said that the primary difference between the language used in Sections (1) and (2) and that used in Section (3) was that the phrase "to promote safety of operation" does not appear in the first two mentioned sections.[14] This Court removed that distinction in the American Trucking Association case and held that employees under each section of the Act meant those whose activities affected safety of operation. Furthermore, this Court pointed out in explaining the Senate Committee's report that the Interstate Commerce Commission's authority over common and contract carriers was similar to that

[13] "Sec. 204 (a). It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this Chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this Chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. . . ."

[14] Interstate Commerce Commission Reports, Motor Carrier Cases, Vol. 13, p. 481.

given over private carriers.[15] Moreover, the legislative history of the Act shows that there was no reason to distinguish the authority of the Commission over the three types of carriers as the need to regulate one was as great as the other.[16]

It should also be noted that the permissive word "may" is used in Sections (1) and (2) of the Act and omitted in Section (3) so that it could properly be argued that it was more imperative for the Commission to prescribe qualifi-

[15] "The Senate Committee's report explained the provisions of 204 (a) (1) (2) as giving the Commission authority over common and contract carriers similar to that given over private carriers by 204 (a) (3). U. S. v. American Trucking Association, supra, p. 548."

[16] 79 Congressional Record, p. 5649, at p. 5651:

> Mr. Wheeler: "The reason why we put that regulation in the Bill was because of the fact that in some instances, as was testified before the Committee, private carriers, contract carriers and common carriers frequently have their employees driving trucks and busses on the road for long periods of time without any effective regulation of any kind whatsoever. It seems to us that there is really much more cause for regulating the hours of service of the truck drivers, contract, private and otherwise . . . than there is as a matter of fact for regulating the hours of labor on the railroads themselves. This is for the reason that when an engineer is on a railroad, he has a track upon which his train runs; but a truck driver or bus driver is on the open highway and if he should fall asleep, he is not only endangering the lives of himself and his passengers, but likewise the lives of the general public.
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> " . . . (page 5652). In order to make the highways more safe and so that common and contract carriers may not be unduly prejudiced in their competition with peddler trucks and other private operators of motor trucks, a provision was added in sub-paragraph 3 giving the Commission authority to establish similar requirements with respect to the qualifications and hours of the employees of such operators. The exercise of this power with respect to the three classes of carriers is intended to be contingent upon the results of comprehensive investigation of the need for regulation of this kind provided for in Section 225. There is considerable demand for the provision of specific hours of service in the Bill itself. Owing to the great variety of motor carriers services and of conditions under which they are conducted, it appeared to the Committee to be unwise to go so far at this time. The investigation referred to will permit the Commission not only to develop whether there is need for regulation, but also to establish requirements which are adapted to the special conditions surrounding the different types and conditions of operation. The original Bill conferred upon the Commission power to regulate the safety of operation and equipment of common and contract carriers, and in paragraph (3) of this section, like authority has been conferred respecting the safety of operation and equipment of private carriers."

See also 79 Congressional Record, p. 12205.

cations and maximum hours of service for private carriers than for the two prior classes.

The Solicitor General, in a very learned and exhaustive brief filed on behalf of the Administrator of the Wage and Hour Division in the Southland Gasoline Company case as amicus curiae, criticizes the opinion of the Circuit Court of Appeals in the pending case and on page 8 says that Senator Wheeler "emphasizes the fact that such regulation of private carriers is conditioned upon a finding after investigation of need therefor." Again on pages 14 and 15, the Solicitor General disagrees with the finding of our Circuit Court that the need for regulating private carriers was obvious. One need only read Senator Wheeler's statement quoted in Note 16 of this brief which immediately followed the phrase cited above, to realize that Senator Wheeler was never in doubt as to the necessity for regulating private carriers.[17] The members of the House likewise were never in doubt.[18] The Congressional Record shows that Senator Wheeler was not emphasizing the phrase but doing little more than reading the provisions of the Act. An exhaustive treatise on the Act does not indicate that any special importance was ever placed upon the words.[19]

A careful consideration of the entire subject leads us to believe that the delay by the Interstate Commerce Commission in prescribing regulations was not caused by reason of uncertainty of the need but because of the enormity of the task and the lack of necessary appropriations.[20]

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[17] 79 Congressional Record, 5651.

[18] 79 Congressional Record, p. 12228.

[19] Sharfman, The Interstate Commerce Commission, 1937, Vol. 4, p. 99, at pages 103, 104, 107. See also Wagner—A Legislative History of the Motor Carrier Act, 1935.

[20] I. C. C. Reports, Motor Carrier Cases, Vol. 3, p. 865. I. C. C. Reports, Motor Carrier Cases, Vol. 23, p. 35.

We realize that the Administrator's interpretation[21] of an Act is usually highly persuasive as an expression of the view of those experienced in administration of the Act and acting with the advice of a staff specializing in its interpretation and application.[22] However, we do not believe the same weight should be given to the Wage Administrator's interpretation of the Motor Carrier Act about which he is not presumed to have expert knowledge, especially where his construction is not supported by the Interstate Commerce Commission and against the great weight of judicial authority. His interpretations are not issued as regulations under statutory authority.

The Petitioner places great emphasis on the case of Panama Refining Company v. Ryan, et al., 293 U. S. 388, and quotes from page 432 of the Court's opinion to the effect that in cases concerned with the delegation of legislative power, when an administrative agency is required as a condition precedent to an order to make a finding of facts, the validity of the order must rest upon the needed finding. This case lays down a recognized principle of constitutional law but is not apposite to the present controversy. While it may be contended under this decision and the other Supreme Court cases similar to it, that the Interstate Commerce Commission could not prescribe regulations until a hearing was held and a need was found, it most certainly cannot be said that it was not given the power to act. The existence of a power and its actual exercise are very different. The Interstate Commerce Commission had the power at all times since the approval of the Motor Carrier Act in 1935 to prescribe Petitioner's maximum hours of service.

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[21] Interpretative Bulletin No. 9. 1942 Wage-Hour Manual 378.

[22] Note 17—Overnight Motor Transportation, Inc. v. Missel, supra.

CONCLUSION.

The language of the exemption statute is plain. Its meaning does not lead to an unreasonable or absurd result nor one plainly at variance with the policy of the legislation as a whole.

We submit, therefore, that this Court should follow the clear meaning of the statute and affirm the decision below. To do otherwise at this late date would not improve or in any way affect the conditions which Congress had in mind when the Act was passed but would be contrary to the plain meaning and intent of the Act and would give rise to untold litigation.

Respectfully submitted,

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